rightness. Even the erstwhile lawyer PW4 was not as forthright as the Court was entitled to expect him to have been. It could not be discerned conclusively from the evidence which party he was actually representing. I found it also significant that when he left practice he went to work for PW5. I could not also help forming the impression that documents were withheld or produced in this case to suit the occasion.

In the light of the foregoing, the suite was dismissed with costs.

SOBENA OFFSHORE INC. SDN. BHD.

v.

TRADERS & CONFIRMERS SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CODE NO. D2-23-2634-88]
30 JANUARY 1992

CONTRACT: Claim by plaintiff for the sum of RM1,248,534.78 - Breach of agreement - Allegation of collateral agreement - Whether valid - Absolute assignment - Revocation - Whether plaintiff entitled to reclaim moneys paid under the assignment.

The plaintiff entered into a written contract with Esso Production Malaysia Incorporated (Esso) to supply couplings as well as provide equipment, services and materials at Esso's factory in Kuantan Port. The contract price was agreed at US$1,132,586.40 and payment was to be made by Esso to the plaintiff progressively.

To supply the materials the plaintiff had, in turn to purchase them from foreign sellers and to finance such purchase, the plaintiff obtained Letters of Credit from a trade financing company in England, McDonald Scales and Co. Ltd. (McDonald Scales) through a confirming house in Malaysia, the defendant, who is also McDonald Scales's agent.

McDonald Scales were obliged to open Letters of Credit in favour of the foreign sellers and the plaintiff would in turn give corresponding bills of exchange in favour of McDonald Scales to mature 180 days from the dates of shipment of the materials and goods ordered.

McDonald Scales issued five Letters of Credit of varying amounts. The plaintiff was to meet payments on the five bills of exchange issued in favour of McDonald Scales. The payments on the five bills of exchange were secured by the personal guarantees of the directors of the plaintiff as well as the corporate guarantees of Sobena Holdings Incorporated Sdn. Bhd.

The plaintiff was only able to meet payment of the last bill of exchange on its due date but not the earlier four bills until well after their due dates owing to the financial difficulties encountered by the plaintiff from September

1987. At this point of time the plaintiff was indebted not only to McDonald Scales but also to the Bank of Commerce (Bank) in the sum of RM1.75m.

The Bank's debt was fully discharged in November, 1987. The plaintiff was left with the amounts due to McDonal Scales on the bills of exchange still due and owing. The plaintiff sought to assign proceeds of the Esso contract in favour of the defendant with the consent of Esso as a means of settling the amounts due upon the bills of exchange. Esso did just that and even after the bills of exchange had been settled in full it continued to release the balance of the contract price to the defendant in compliance with the strict terms of the assignment. The plaintiff claims the balance of the proceeds of the Esso contract.

Issues

(1) Whether there was an oral collateral agreement between the plaintiff and the defendant that the defendant would revoke the assignment once McDonald Scales had been fully paid.
(2) Whether there was sufficient consideration given for the assignment.
(3) Whether the defendant was right in retaining the surplus.

Held:

[1] From the documentary and oral evidence gathered there was in fact such a collateral agreement between the plaintiff and the defendant and on that finding the defendant's justification in retaining the surplus sum must fail.

[2] A collateral agreement is not unknown in law and it is a valid and enforceable agreement existing side by side with the principal agreement.

[3] There is overwhelming inference that the plaintiff only agreed to the absolute assignment upon the defendant's assuarance that the assignment would be revoked once McDonald Scales had been paid in full.

[Plaintiffs claim allowed with costs].

For the plaintiff - K. Anantham; M/s. Skrine & Co.
For the defendant - Ronald Khoo (Miss B.K. Khoo with him) M/s. Shook Lin & Bok

JUDGMENT

Siti Norma Yaakob J:

On 27 July 1987, the plaintiff in these proceedings entered into a written contract, No. PC 7527, with Esso Production Malaysia Incorporated (Esso) to supply couplings as well as provide equipment, services and materials at Esso's factory in Kuantan Port, for the threading of Esso's plain-end casings. The contract price was agreed at US$1,132,586.40 and payment was to be made by Esso to the plaintiff progressively. The contract appears at pp. 3 - 19 of P1.

To supply the materials and goods for the contract works, the plaintiff had, in turn, to purchase them from foreign sellers and to finance such purchases, the plaintiff obtained letters of credit from a trade financing company in England, McDonald Scales & Co. Ltd. (McDonald Scales), through a confirming house in Malaysia, the defendant, who is also McDonald Scales' agent.

The plaintiff's authority to obtain such facility is contained in two circular resolutions dated 7 May 1987 and 18 June 1987, found at p. 3 of D3 and p. 20 of P1. These two resolutions also contain other terms and conditions particularly the obligations of McDonald Scales to arrange for a bank or banks to open letters of credit in favour of the foreign sellers and the plaintiff would in turn give corresponding bills of exchange in favour of McDonald Scales to mature 180 days from the dates of shipments of the materials and goods ordered.

Under this arrangement, McDonald Scales issued five letters of credit of varying amounts particulars of which appear at p. 75 of P1 and the plaintiff was to meet payments on the five bills of exchange issued in favour of McDonald Scales appearing at pp. 28, 24, 25, 31 and 33 of P1 on 8 October 1987, 9 November 1987, 20 December 1987 and 30 January 1988 respectively. Payments on the five bills of exchange were secured by the personal guarantees of the directors of the plaintiff as well as the corporate guarantee of Sobena Holdings Inc. Sdn. Bhd.

The plaintiff was only able to meet payment of the last bill of exchange on its due date but not the four earlier bills until well after their due dates and this was due to the financial difficulties encountered by the plaintiff from September 1987.

At that point of time the plaintiff was not only indebted to McDonald Scales but also to Bank of Commerce in the sum of RM1.75 million in respect of credit and overdraft facilities granted by the bank for which the plaintiff had defaulted in its obligations since July and August 1987. As the plaintiff's only source of income was from the proceeds of the Esso contract and that too was in jeapordy for lack of funds, the Bank of Commerce was threatening to appoint Messrs. Arthur Andersen & Co. as the Receivers and Managers of the plaintiff under a debenture which formed part of the security provided by the plaintiff for the banking facilities so as to ensure not only the successful completion of the Esso contract but that its interest would also be protected as the plaintiff had assigned the proceeds of the Esso contract to the bank. For this purpose, a special account was opened with the bank into which moneys due to the plaintiff from the Esso contract were paid and managed by the Managing Director of the defendant, DW2. Pursuant to the plaintiff's circular resolution dated 6 May 1987, appearing at p. 35 of P1, the plaintiff appointed DW2 as its Financial Controller and she also became a mandatory signatory for all cheques issued from the special account. The reason given by the plaintiff why DW2 had such a big say in the management of its funds was to safeguard McDonald Scales' interests on the bills of exchange which the plaintiff had great difficulty in settling on their maturity dates.

The threatened appointment of Messrs. Arthur Andersen & Co. as Receivers and Managers of the plaintiff did not however take place as the shareholders of the plaintiff succeeded in selling their shares to a Singapore company called Sairex and the proceeds of sale were sufficient, at least, to settle the plaintiff's indebtedness to the Bank of Commerce and by November 1987, the assignment of the proceeds of the Esso contract to the bank was revoked so too the securities provided by the plaintiff namely the joint and several guarantee executed by the directors of the plaintiff and the debenture executed in favour of the bank.

With the bank's debt being fully discharged in November 1987, that left the plaintiff with only the amounts due to McDonald Scales on the bills of exchange still due and owing. The plaintiff was only able to settle the first bill of exchange which matured on 8 October 1987 on 17 November 1987, and that too by 2 instalment payments. By that date the maturity date of the second bill of exchange had already passed and McDonald Scales was pressing the defendant to get payment not only on the second bill of exchange but also to ensure that the remaining 3 bills were to be settled on their due dates.

Since the plaintiff's only known source of income was from the proceeds of the Esso contract, it executed a second assignment of the contract in favour of the defendant with the consent of Esso, as that was the only means of settling the amounts due on the bills of exchange. By this assignment dated 16 December 1987 and which appears at pp. 43 - 44 of P1, Esso would release all the proceeds of the Esso contract to the defendant absolutely. Esso did just that and even after 11 February 1988 when all the amounts due to McDonald Scales on the bills of exchange had been settled in full, it continued the release of the balance of the contract price to the defendant in compliance with the strict terms of the assignment.

It is the plaintiff's contention that the assignment is to be read against the background of an oral collateral agreement it had made with the defendant, which induced the plaintiff to execute the assignment in favour of the defendant that once McDonald Scales' debts had been settled in full, the defendant was to revoke the assignment to enable the plaintiff to enjoy the balance of the proceeds of the Esso contract directly from Esso. The defendant has however denied the existence of any oral collateral agreement to revoke the assignment after its purpose had been fulfilled and has maintained that as the assignment is absolute, it has every right to retain the surplus as well. Furthermore it had, at the request of the plaintiff provided valuable consideration to McDonald Scales in that it had given an oral guarantee or undertaking that it would meet payments of the bills of exchange in the event of the plaintiff's default and relying on this guarantee or undertaking, McDonald Scales had refrained from suing the plaintiff on the bills of exchange or enforcing on either the personal guarantees provided by the directors of the plaintiff or the corporate guarantee given by Sobena Holdings.

From the pleadings, the plaintiff has averred to five alternative causes of action against the defendant and these are found at paragraphs 8, 10, 13, 17 and 18 of the re-amended statement of claim but at the trial has confined them

to only two namely that there was an oral collateral agreement that the defendant would revoke the assignment once McDonald Scales had been paid in full and secondly there was no sufficient consideration given for the assignment.

It is not disputed that the deed of assignment was executed on Esso's standard form of assignment and was on the face of it absolute. It is also not disputed that the consideration stated in clause 1 of the assignment is incorrect as the defendant has never agreed to supply goods and materials to the plaintiff for the same to be supplied to Esso. This in itself is a good ground for holding the assignment invalid but since the parties in this suit are not questioning the legality of the assignment itself, I will leave the matter as it is.

Evidence leading to the execution of the assignment came from PW1, PW2 and DW2. PW1, Esso's representative, testified that he had called a meeting of all concerned on 8 December 1987, to thrash out DW2's request to have the benefits of the Esso contract assigned to the defendant in settlement of the plaintiff's indebtedness to McDonald Scales. The meeting was held in PW1's office attended by PW1, together with another officer from Esso, PW2 and DW2.

It is also not disputed that the value of the Esso contract far exceeded the amount owed to McDonald Scales and it was for this very reason that PW2 had sought PW1's consent that there be only a partial assignment of the Esso contract to the defendant to the extent that the assignment will cover payments of the amount due to McDonald Scales but PW1 was not agreeable as firstly an assignment in such form is illegal under the law and secondly it would be difficult for Esso to monitor the payments. In any event PW1 assured PW2 that the assignment can, with the consent of all parties, be revoked once its purpose had been fulfilled. As PW2 was uncertain what form the assignment should take, the meeting ended with PW2 promising to refer the matter to his superior for a final decision. Within two weeks PW2 confirmed with PW1 that the assignment should be in the manner as suggested and drafted by Esso.

PW2 confirmed PW1's evidence of what had transpired at the meeting. It is also his evidence that immediately after the meeting he had consulted DW2 as to the form the assignment should take and it was agreed between them that they should go along with PW1's suggestion that the assignment be in the form of an absolute one but as between themselves once McDonald Scales had been paid in full and the purpose of the assignment had been exhausted, they would approach Esso to have the assignment revoked so that Esso could revert to paying the balance of the contract price directly to the plaintiff.

DW2's recollection of the meeting was that it was a very short one as they had gathered to have a sight of Esso's standard form of assignment. She testified that as PW1 had a guest in his room, he merely stated that the assignment would have to be in Esso's format and for that purpose instructed his assistant to get a copy of Esso's standard form for distribution to her and PW2. Apart from this, nothing else transpired and there was definitely no discussion as to whether the assignment can be a partial one nor was there any agreement reached after the meeting between her and PW2 that once the defendant had received all the sums due for McDonald Scales, she and PW2 would request Esso to have the assignment revoked.

A number of objections were raised on the evidence of this meeting. The defendant questions the acceptance of PW1's evidence as being tainted with uncertainty and that I should be wary of PW2's evidence as in the earlier O. 14 proceedings, it was not PW2 who filed affidavits on behalf of the plaintiff but one Ahmad Sobri bin H.A. Tajuddin, a majority shareholder and Director of the plaintiff. It is the defendant's contention that Encik Ahmad Sobri should testify on behalf of the plaintiff and not PW2.

PW1 was subpoenaed purely to testify as to what had transpired at the meeting as he had called for such a meeting in the first place and he was also present at the meeting. He has nothing to gain from the outcome of this case and from the candid manner in which he answered the questions put to him, he was doing nothing more than to testify to matters of which he had knowledge and as he had seen them. I see nothing objectionable his evidence, it is neither tainted with uncertainty nor biased against anybody.

As for PW2, he was the plaintiff's Managing Director at the relevant time but has since left the plaintiff in 1988. He dealt directly with PW1 and DW2 and all important correspondence pertaining to the assignment were ei-

ther signed by him or received by him on behalf of the plaintiff. The fact that the plaintiff preferred him to testify on its behalf is in itself a reflection of the role he had played in the affairs of the plaintiff, particularly in the execution of the assignment, which is now being disputed. The fact that he is not a shareholder of the plaintiff is not in itself a ground for treating his evidence with suspicion unless there are reasons to hold so. In this instance I find no evidence indicative of such suspicion and to that extent any objection to his evidence is unfounded and uncalled for.

Turning to DW2's evidence on the meeting of 8 December 1987, her testimony contradicts PW1's and PW2's evidence in two aspects. Firstly she raised an issue on the number of people present at the meeting. Her testimony that there was a complete stranger present whom she identifies as a guest of PW1 was never put to PW1 when he was in the witness box and neither was PW2 cross-examined as to the number of people attending the meeting. Secondly DW2 states that the purpose of the meeting was purely to get a copy of Esso's standard assignment and as such it was a very short meeting indeed. There was no discussion as to whether a partial assignment was possible as PW2 had already, by letter dated 25 November 1987, indicated to PW1 that the plaintiff was agreeable to an irrevocable assignment. This letter appearing at p. 18 of D3 was also copied to her.

In the course of his testimony, PW2 explained that he had to write the letter dated 25 November 1987 to appease DW2 as she was worried that McDonald Scales would not be paid and she was pressing him to execute the assignment of the proceeds of the Esso contract to the defendant. Placed in the position that the Bank of Commerce was not only threatening to withdraw all the banking facilities but also to appoint Receivers and Managers to manage the plaintiff's assets, the plaintiff was caught in the unhappy situation of seeing their obligations to Esso thwarted for lack of funds. Being the plaintiff's Financial Controller and aware of the plaintiff's vulnerable position and its inability to pay McDonald Scales, DW2 had demanded some form of security from PW2 and the only form of security that PW2 could come up with at that point of time was to assign the proceeds of the Esso contract to the defendant, that being the only source of income due to the plaintiff. It was under these circumstances that PW2 wrote the letter dated 25 November 1987, but between him and DW2, there was the underlying agreement that the assignment was purely to settle the amounts due to McDonald Scales.

It is also PW2's testimony that although the letter was dated 25 November 1987, and addressed to Esso, he never despatched it to Esso immediately although he had given the copy to DW2 on the very day it was written. His reason for withholding the letter from Esso was that he still entertained the hope that the proceeds of the sale of the shareholders' shares to Sairex would be sufficient to settle not only the plaintiff's indebtedness to the bank but to McDonald Scales as well so that the proposed assignment of the Esso contract to the defendant will not become necessary.

When cross-examined, DW2 admitted that she had pursued PW2 for the assignment particularly after the plaintiff had settled Bank of Commerce in full. She also admitted that she saw PW2 on 25 November 1987 but could not recall what actually transpired that day particularly when she was questioned on whether she was instrumental in getting PW2 to write the letter. However, she admitted she was given a copy of the letter but again could not recall what she did with the letter. DW2's failed memory must work against her and I cannot but feel that she is holding back on matters that are not favourable to her.

The letter which has been produced in the defendant's bundle of documents at p. 18 of D3, contains a signed acknowledgment by Esso which in itself supports the plaintiff's contention that without PW2's knowledge, DW2 extended a copy of the letter to Esso. In any event, Esso did not act immediately on the letter as the assignment was only executed on 16 December 1987, and before its execution, there was the meeting of the 8 December 1987, which DW2 maintains was only to have a sight of Esso's standard assignment. Here again I have my doubts as to the veracity of DW2's evidence for if the intention of the meeting was only to have sight of Esso's standard format, the same purpose can be achieved by Esso despatching or faxing a copy of it to PW2 and DW2. The very fact that a meeting was called for by PW1, can only mean that armed with the plaintiff's letter dated 25 November 1987, DW2 had, on her own, pestered Esso to assign the proceeds of the contract to her and it was to consider her request as well as to hear

DW2's proposals on the proposed assignment that the meeting was convened when PW2 mooted the idea of just executing a partial assignment only.

DW2 justifies her action in retaining the surplus of the Esso proceeds by the oral guarantee and indemnity she is alleged to have given to DW1, that she was prepared to meet the plaintiff's debts to McDonald Scales provided McDonald Scales refrained from suing the plaintiff or enforcing the securities provided by the plaintiff. In this respect, she has maintained both in her pleadings as well as in her oral testimony that the guarantee and indemnity was given pursuant to PW2's request. However when PW2 was in the witness box, he was never questioned as to whether he had requested DW2 to guarantee payment of the plaintiff's debts to McDonald Scales.

It is not disputed that the total amount due to McDonald Scales was in the region of RM1.5 million and it seems highly inconceivable that a guarantee and indemnity for such a large sum had gone undocumented particularly when the guarantor does not reside in the same country as the principal. In any event, was a guarantee and indemnity necessary in the circumstances of this case?

With the exception of the last bill of exchange, PW1 has confirmed that there was only a delay of about one to two months before the other four bills of exchange were settled in full. There is provision for the charging of interests for late payments as seen from p. 20 of P1 and the plaintiff has already been penalised for such late payments. This is clearly shown in the plaintiff's letter dated 8 February 1988 (pp. 51-54 of P1) where US$32,293.67 had been accounted as interests paid by the plaintiff for late payments. This is not a case where the plaintiff denies its liability to pay McDonald Scales and has refused to make payments but it is a case of delayed payments for which McDonald Scales has already been compensated with interests.

Apart from her bare statement that she had provided a guarantee and indemnity to McDonald Scales, DW2, was not able to give further particulars of the nature of the security she had provided. The purported guarantee was made orally by a long distance telephone conversation between DW1 and DW2 and as between them there may well be a guarantee but the issue here is whether the plaintiff had asked the defendant to provide a guarantee to McDonald Scales. There is no evidence that such a request was made by the plaintiff nor is there any evidence to show that the defendant had informed the plaintiff that it had guaranteed payment of its debts to McDonald Scales. On that finding, the defendant's justification in retaining the surplus sum must fail.

A collateral agreement is not unknown in law and subject to certain requirements, it is a valid and enforceable agreement existing side by side with the principal agreement. In this case, the principal agreement is the assignment and the collateral agreement which the plaintiff seeks to establish is whether the defendant had orally promised the plaintiff to have the assignment revoked once McDonald Scales had been paid in full. To establish this, it must be determined whether DW2 did make the promise and whether it induced PW2 to execute the absolute assignment.

From the documentary and oral evidence and the acts and omissions of PW2 and DW2, there is overwhelming inference that PW2 only agreed to the absolute assignment upon DW2's assurance that the assignment would be revoked once McDonald Scales had been paid in full. My conclusion is further strengthened by the subsequent conduct of PW2 and DW2 as seen from the plaintiff's letter at p. 51 -54 of P1 where the plaintiff had indicated to Esso that the assignment be revoked effective from 10 February 1988, being the date when the plaintiff's indebtedness to McDonald Scales was settled in full. Although the letter was copied to the defendant, it chose to ignore it completely and if indeed there was no prior agreement to have the assignment revoked after its purpose has been fulfilled, the defendant could have at least denied the existence of any such agreement. Further reminders and correspondence by the plaintiff to have the surplus refunded met with the same stony silence from the defendant and bearing in mind that there is no earthly reason why the plaintiff should part with RM1.2 million to the defendant, the defendant's silence is therefore understandable. On that finding since the surplus of the contract moneys in the hands of the defendant has been agreed at RM1,248,534.78, there will be judgment for the plaintiff against the defendant for that sum, interest at 8% per annum from 15 October 1988 to date of realisation and costs.